In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 634

C. W. BRENNAN, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a–35a) is reported at 379 F. 2d 803. The opinion of the district court (Pet. App. 1a–26a) is reported at 251 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was filed June 22, 1967. The petition for a writ of certiorari was filed on September 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly refused to disturb the long-standing ruling of the Secretary of the

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Interior that the reservation of minerals to the United States required by a 1914 statute in homestead patents to lands classified as valuable for oil, gas or nitrates, embraced oil shale valuable as a source of oil and nitrogen.

2. Whether the mineral reservation was validly required after the homestead entry but before final proofs and payment were submitted.

3. Whether, under the facts, the patentee agreed to the reservation of oil shale rights by the United States.

STATUTE INVOLVED

The Act of July 17, 1914, 38 Stat. 509, as amended (30 U.S.C. 121–123), is set out in the Appendix to the Petition (pp. 38a–40a).

STATEMENT

In 1907, George H. Baxter, petitioner's predecessor in title, settled upon a 160-acre tract of agricultural public lands in Colorado (R. 135, 136). In 1909, he filed his formal application to enter the land under the Homestead Act (43 U.S.C. 161–164) (R. 156). He described the land as essentially non-mineral (R. 157).

Soon thereafter, Congress, in order to permit agricultural entry upon lands valuable for certain minerals, passed the Act of July 17, 1914, 38 Stat. 509 (30 U.S.C. 121–123), which authorizes agricultural entry (with reservation of the minerals to the United States) on lands previously entered or thereafter entered where the lands were "withdrawn or classified as [containing] phosphate, nitrate, potash, oil, gas,

or asphaltic minerals, or which are valuable for those deposits" (Pet. App. 38a).

Subsequently, on May 23, 1916, the Director of the Geological Survey wrote to the Commissioner of the General Land Office as follows (R. 202):

> The oil shales of western Colorado and adjoining areas constitute an undeveloped source of petroleum to which attention was called by the Geological Survey in 1901, and it is now recognized as possible that these shales will prove equally important as a source of nitrogen. During the field seasons of 1913, 1914, and 1915, reconnaissance examination in this region was actively carried forward, and it was demonstrated that over wide areas oil shales are present which average higher in petroleum content than those commercially worked in other countries. The average shale tested within the area examined yields more than one-half barrel of crude oil per short ton of rock and a yield of one barrel per ton is not uncommon.
>
> The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.
>
> While the data at hand are not sufficient to warrant a specific statement as to the total recoverable nitrogen content of these shales, it is believed possible that this will prove so large as to give these deposits a value as a source of nitrogen equal to their value as a source of petroleum.

> In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the nonmineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type.
>
> Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records * * *.

Baxter's land was within the areas so classified (R. 9, 202). On June 29, 1916, the Commissioner advised the local Land Office of the classification, stating that it "will be operative under and subject to the provisions" of the 1914 Act and that the tract books should note these lands as "valuable as a source of petroleum and nitrogen" (R. 203–204).

On November 16, 1916, the Land Office submitted to Baxter for signature a "petroleum waiver" which provided (R. 145, 149):

> I * * * hereby apply to have my entry considered as made under the Act of July 17, 1914 (38 Stat. 509) and hereby consent that the patent issued to me thereunder shall contain

the provisions, reservations, conditions and limitations of said act.

Baxter executed the waiver and, in January 1917, made his final proof and payment to the Land Office[1] (R. 135–144). A final certificate and a patent were subsequently issued, each reserving to the United States all "nitrates, oil and gas," expressly pursuant to the 1914 Act (R. 131, 160–161).

Nothing further occurred until 1963, when petitioner, as Baxter's successor in title, sought a decision from the Bureau of Land Management that oil shale was not included in the terms "oil, gas or nitrate" as used in the 1914 Act and, hence, was not reserved in the patent (R. 10, 159–160). The Bureau concluded (R. 4; Pet. App. 36a–37a):

> The Baxter entry was subject to cancellation prior to July 17, 1914, because it covered lands then valuable for oil shale and thus reserved for disposition under the mineral land laws. 43 U.S.C. 201, 30 U.S.C. 21 Cf. Deffebach v. Hawke, 115 U.S. 392 (1885); Colorado Coal & Iron Co. v. U.S., 123 U.S. 307 (1887). But after the act of that date, the entry could be and was passed to patent upon the entryman's consent that the patent to be issued "thereunder shall contain the provisions, reservations, conditions

[1] In the final proof papers, Baxter and his two witnesses stated that to their knowledge there were no indications of minerals of any kind on the land. These two witnesses had also been the witnesses to Baxter's execution of the consent to the 1914 Act mineral reservation. Notwithstanding the possible conflict between the answers in the final proof and the execution of the consent, the records indicate no protest by Baxter to the inclusion of the reservation nor any contest on this issue.

and limitations of the said act." It is clear that it was the intention of the parties to allow patent by reserving the oil shale to the United States and that the appropriate reservation of "oil and gas" includes oil shale. Smallhorn Oil Shale Refining Co., et al., 52 L.D. 329 (1928).

That decision was approved by the Assistant Secretary of the Interior on January 20, 1964 (R. 4).

Petitioners then instituted this action to enjoin the Secretary from asserting any rights to oil shale deposits in the tract. Both the district court and the court of appeals upheld the Secretary's ruling.

ARGUMENT

The decision below rests (1) upon a consistent construction by the Secretary of the Interior, initiated 50 years ago and known to Congress for most of that period, that the reservation of "oil" in the 1914 Act includes oil shale "as a source of petroleum," and (2) upon a "petroleum waiver" executed by petitioner's predecessor in title on the basis of that construction. The broad, novel effect on western land titles which petitioner seeks to assert is thus simply not present. Since the court below merely sustained that construction and gave proper effect to the petroleum waiver made in the same setting and terms, no further review is warranted.

In any event, the determination that the required reservation of "oil" in the Act embraced oil shale—principally valuable as a source of petroleum—was reasonable. It has since been consistently followed by the Secretary and, as the court below noted, Congress

has repeatedly acted on the basis of that view without treating it as contrary to the statute (Pet. App. 32a–34a). Cf. *Udall* v. *Tallman*, 380 U.S. 1. The classification of Baxter's land as mineral, subsequent to entry but before final proof and payment, was expressly contemplated by Sections 2 and 3 of the 1914 Act (Pet. App. 12a). Moreover, Baxter consented, in the petroleum waiver, to application of the 1914 Act to his entry, and did not contest its classification as mineral. Baxter's land contained no known oil, except that which could potentially be derived from oil shale. It cannot reasonably be held now that Baxter did not know that his tract was classified as mineral because of the oil shale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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